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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

FRANCISCO DELEON, JR., Plaintiff and Respondent, v. PATRICIA L. FREGOSO et al., Defendants and Appellants.	B281272 Los Angeles County Super. Ct. No. BC528572

APPEAL from a judgment of the Superior Court of Los Angeles County, Victor E. Chavez, Judge. Affirmed.

Horvitz & Levy, Barry R. Levy, Joshua C. McDaniel; Schumann | Rosenberg, Kim Schumann and Marlys K. Braun for Defendant and Appellant.

Angelo & Di Monda, Joseph Di Monda and Christopher E. Angelo for Plaintiff and Respondent.

INTRODUCTION

Defendant and appellant Patricia Lynn Fregoso appeals from the trial court's judgment entered in favor of plaintiff and respondent Francisco Deleon, Jr. after a jury found Fregoso was negligent when she hit Deleon with her car as he was using a marked crosswalk. Fregoso contends: (1) insufficient evidence supports the jury's negligence finding; (2) it was unreasonable for the jury to find she was 95 percent at fault for causing the accident; and (3) the court prejudicially erred when it allowed a traffic engineer to testify about the average perception-response time for a driver because he was not an expert on that matter. We affirm.

FACTS AND PROCEDURAL BACKGROUND

1. The Accident

The accident giving rise to this lawsuit occurred at the intersection of Firestone Boulevard and Norwalk Boulevard in the City of Norwalk. As it approaches Norwalk Boulevard from the east, Firestone Boulevard is a four-lane road, with two eastbound lanes and two westbound lanes, with a speed limit of 40 miles per hour. At its intersection with Norwalk Boulevard, the westbound side of Firestone Boulevard also has a dedicated left turn lane. A landscaped median divides the east- and westbound lanes of Firestone Boulevard, running from the intersection with Norwalk Boulevard several hundred feet to the east, toward the 5 Freeway. At the time of the accident, the median was landscaped with plants that reached about five feet above the pavement and small trees that were spaced about 30 feet apart.

The intersection at Firestone Boulevard and Norwalk Boulevard contains a marked crosswalk, which is illuminated by streetlights lining Firestone Boulevard, including two lights directly above the crosswalk. The crosswalk is not equipped with a traffic signal, a stop sign, or flashing lights to warn drivers when a pedestrian is using the crosswalk. However, signs are posted along the stretch of Firestone Boulevard approaching Norwalk Boulevard to warn drivers that the road contains pedestrian crosswalks for several miles.

On the morning of January 18, 2013, Fregoso was driving to work in Norwalk. Around 6:30 a.m., while it was still dark out, Fregoso entered Firestone Boulevard from the 5 Freeway and drove several blocks west, heading toward the intersection with Norwalk Boulevard. As she left the freeway, Fregoso saw the signs warning drivers that Firestone Boulevard contained pedestrian crosswalks. Fregoso, who had driven the same route to work for about two years, claimed she had never seen a pedestrian use the crosswalk at Norwalk Boulevard and Firestone Boulevard before the date of the accident.

Around the time Fregoso left the freeway, Deleon, who was seventeen years old at the time, was walking to his high school along the sidewalk of Norwalk Boulevard. He was wearing black pants and a black sweatshirt, and he had a dark-colored beanie or hood over his head. When he reached the intersection of Norwalk Boulevard and Firestone Boulevard, Deleon entered the crosswalk and continued walking north across the eastbound lanes of Firestone Boulevard.

When Fregoso was about 260 feet from the intersection of Firestone Boulevard and Norwalk Boulevard, Deleon entered the portion of the crosswalk that traverses the westbound side of

Firestone Boulevard. About 100 feet from the intersection, Fregoso pulled into the left-hand lane of the westbound side of Firestone Boulevard from behind a truck that was driving in the right-hand lane. Intending to reenter the right-hand lane to make a right turn a couple of blocks after Norwalk Boulevard, Fregoso continued to monitor the truck as she approached the intersection.

When Fregoso reached the intersection, she was still driving in the left-hand lane, at a speed between 30 and 45 miles per hour. As Deleon was about to reach the right-hand lane of Firestone Boulevard, Fregoso hit him with her car. Fregoso testified she did not see Deleon until the time of impact, and surveillance footage taken from a nearby business showed that she did not brake until nearly a second after she hit Deleon. Fregoso did not stop her car until about 130 feet from the point of impact.

2. The Trial

In November 2013, Deleon filed this action against, among other defendants, Fregoso and the City of Norwalk (City).[1] Deleon alleged Fregoso was negligent when she hit him in the crosswalk at the intersection of Firestone Boulevard and Norwalk Boulevard. With respect to the City, Deleon alleged it had maintained a dangerous condition of public property by allowing the foliage planted inside the median that divides the east- and westbound lanes of Firestone Boulevard to obscure drivers' views of the area of the crosswalk that traverses the eastbound lanes. A jury trial began in January 2017.

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[1] The City has not participated in this appeal.

2.1. Expert Testimony

Marc Pryor, a mechanical engineer, testified for the City. Pryor visited the scene of the accident several times and reviewed police reports and photographs produced after the accident. Pryor also reviewed Fregoso's sworn discovery responses and pretrial deposition testimony, as well as the declarations of various expert witnesses who also examined the accident. Based on this information, and taking into consideration the lighting conditions at the time of the accident, Pryor created a simulation of the accident.

In Pryor's opinion, Fregoso hit Deleon because she was distracted as she approached the intersection of Firestone Boulevard and Norwalk Boulevard. Pryor based his opinion on the following evidence: (1) about 100 feet before reaching the crosswalk, Fregoso pulled into the left-hand westbound lane of Firestone Boulevard to pass a truck that was driving in the right-hand lane; (2) Fregoso was preoccupied with the truck as she approached the crosswalk because she wanted to make a right turn a couple of blocks after Norwalk Boulevard; (3) Fregoso did not see Deleon until the moment of impact; and (4) Fregoso did not brake until almost one second after she hit Deleon.

Pryor also believed that, had Fregoso been paying attention to the road in front of her, she would have seen Deleon at a distance from which she could have avoided hitting him. Pryor testified that Deleon was walking about 4.34 feet per second as he traversed the crosswalk. Based on Deleon's walking speed, Fregoso's driving speed, and the point in the crosswalk at which Fregoso hit Deleon, Pryor concluded that Deleon had entered the part of the crosswalk that intersects the westbound lanes of Firestone Boulevard when Fregoso was about 260 feet from the

intersection. At that point, Deleon would have been visible to Fregoso had she been looking at the road in front of her. Assuming it would have taken her between two and two-and-a-half seconds to react once she saw Deleon,[2] Fregoso could have stopped her car with at least 35 feet to spare.

Brad Avrit, a civil engineer, testified for Deleon. Avrit's practice focuses on reconstructing automobile accidents. In preparing to testify at trial, Avrit visited the scene of the accident, reviewed police photographs and reports produced after the accident, and read some of the interrogatory responses, depositions, and expert declarations produced during discovery.

In Avrit's opinion, Fregoso could not have avoided hitting Deleon once he came into her field of vision. Avrit believed the accident was caused by a combination of the low-light conditions and the fact that the foliage inside the median dividing the east- and westbound lanes of Firestone Boulevard prevented Deleon and Fregoso from seeing each other until it was too late for Fregoso to avoid hitting Deleon. According to Avrit, the City

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[2] Several of the experts who testified at trial defined the amount of time it takes a driver to perceive and react to visual or audio stimuli—e.g., how long it takes for a driver to brake upon seeing an object in the road—as the driver's "perception-response" or "perception-reaction" time. Factors that affect a driver's perception-response time include: (1) visibility—low visibility can increase the driver's reaction time; (2) the driver's speed—the higher the speed, the harder it may be for the driver to detect a hazard or pedestrian; (3) whether the object is moving—it is easier for a driver to detect a moving, as opposed to a stationary, object; (4) the driver's level of vigilance—if the driver is being vigilant in watching for hazards or pedestrians, the driver's reaction time should decrease; and (5) the number of options the driver has to avoid an accident—the more decisions a driver has to make, the longer it should take for the driver to react.

failed to maintain the foliage inside the median at a height that would not obscure drivers' views of pedestrians as they walked from the eastbound side of Firestone Boulevard to the westbound side.

On cross-examination, the City's counsel posed a hypothetical based on facts similar to those Pryor relied on to conclude Fregoso would have had sufficient time to stop her car to avoid hitting Deleon had she been focusing on the road in front of her. Applying a two-second perception-response time, Avrit confirmed that Fregoso could have stopped her car at least 30 feet before the point of impact had she reacted to Deleon once he came into her field of vision.

David Krauss, a "human factors scientist," testified for Fregoso. On direct, Krauss opined that Deleon's dark-colored clothing would have made it difficult for Fregoso to see Deleon before she reached the crosswalk. Krauss believed the earliest Fregoso could have seen Deleon was when she was about 100 feet from the crosswalk. Applying a range of perception-response times with one and a half seconds as the shortest time, Krauss believed it would have taken Fregoso at least four seconds to stop her car once she saw Deleon, an insufficient amount of time for Fregoso to avoid the accident.

On cross-examination, Krauss acknowledged that he had never interviewed Fregoso about the accident. He also clarified that he had formed his opinion that Fregoso would not have been able to see Deleon until she was 100 feet from the crosswalk on a series of studies examining drivers' reaction times under simulations that involved much darker lighting conditions than those that existed when Fregoso hit Deleon. The studies also involved pedestrians appearing at random from the side of the

road, not at marked crosswalks. According to Krauss, most drivers in those studies would not see pedestrians until they were 30 feet away. Krauss decided to increase the distance at which Fregoso could have seen Deleon to 100 feet to compensate for the brighter lighting conditions, the marked crosswalk, and the signs on Firestone Boulevard warning drivers about pedestrians using crosswalks. But Krauss did not explain how he decided to increase Fregoso's sight distance, other than stating that he believed "rounding up to 100 [feet] is a fair estimate."

2.2. The Jury's Verdict and Entry of Judgment

In late January 2017, the jury returned a special verdict, finding both Fregoso and Deleon were negligent, and that their negligence was a substantial factor in causing the accident. The jury found Fregoso was 95 percent liable, and Deleon was 5 percent liable, for causing the accident. The jury also found that the City was not liable for causing the accident. The jury awarded Deleon damages totaling $13,820,000. In February 2017, the court entered judgment against Fregoso and in favor of Deleon and the City. In April 2017, the court denied Fregoso's motion for a new trial.

Fregoso filed a timely notice of appeal from the judgment.

DISCUSSION

Fregoso contends the jury's verdict is not supported by substantial evidence because uncontradicted expert testimony established she could not have avoided hitting Deleon, and, even if she was negligent, it was unreasonable for the jury to conclude she was 95 percent at fault for causing the accident. Fregoso also contends the court prejudicially erred when it allowed an expert who was not qualified in the area of "human factors" to testify

that the average perception-response time for drivers was lower than what the other experts claimed Deleon's response time would have been leading up to the accident.

1. Substantial evidence supports the jury's verdict.

According to Fregoso, she could not be at fault for hitting Deleon because uncontroverted expert testimony established she could not have avoided the accident. Fregoso asserts no witnesses contradicted Krauss's and Avrit's testimony that, under the circumstances leading up to the accident, Fregoso would not have been able to see Deleon until she was only 100 feet from the crosswalk, and that at such a short distance she would not have been able to avoid hitting Deleon once he came into her field of vision. In the alternative, Fregoso contends that even if she was negligent, it was unreasonable for the jury to find her 95 percent at fault because Deleon "was in the best position to avoid this accident, and so most of the fault should have been assigned to him." We reject both these arguments.

In California, a driver must use ordinary care to prevent injuries to pedestrians. (*Monreal v. Tobin* (1998) 61 Cal.App.4th 1337, 1350.) As part of this duty, a driver must yield to pedestrians in crosswalks. (Veh. Code, § 21950, subd. (a).) Specifically, a driver must keep a "lookout for other vehicles or persons on the highway and must keep [her] car under such control as will enable [her] to avoid a collision; failure to keep such a lookout constitutes negligence."[3] (*Downing v. Barrett*

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[3] With respect to a driver's basic standard of care, the court instructed the jury as follows: "A person must use reasonable care in driving a vehicle. Drivers must keep a lookout for pedestrians, obstacles, and other vehicles. They must also control

Mobile Home Transport, Inc. (1974) 38 Cal.App.3d 519, 524 (*Downing*).) Whether a driver was negligent in hitting a pedestrian or another vehicle, and the extent to which the driver's negligence contributed to the accident, is ordinarily a question of fact for the jury. (*Ibid*.)

We review a jury's factual findings for substantial evidence. (*Lenk v. Total-Western, Inc.* (2001) 89 Cal.App.4th 959, 968.) When applying the substantial evidence standard of review, we " ' "view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor." ' [Citation.]" (*Moran v. Foster Wheeler Energy Corp.* (2016) 246 Cal.App.4th 500, 517.) "We do not reweigh evidence or reassess the credibility of witnesses. [Citation.] [Because we] are 'not a second trier of fact.' [Citation.]" (*Pope v. Babick* (2014) 229 Cal.App.4th 1238, 1246.) Substantial evidence is " 'evidence of ponderable legal significance, … reasonable, credible, and of solid value.' [Citation.]" (*Ibid*.) "Inferences may constitute substantial evidence, but they must be the product of logic and reason. Speculation or conjecture alone is not substantial evidence." (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651.)

As a preliminary matter, Fregoso has waived any challenge to the sufficiency of the evidence to support the jury's verdict. "A party who challenges the sufficiency of the evidence to support a finding must set forth, discuss, and analyze all the evidence on that point, both favorable and unfavorable." (*Doe v. Roman Catholic Archbishop of Cashel & Emly* (2009) 177 Cal.App.4th

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the speed and movement of their vehicles. The failure to use reasonable care in driving a vehicle is negligence." (See CACI No. 700.)

209, 218.) An appellant who fails to meet this burden waives any claim that the court's finding is not supported by substantial evidence. (*Ibid*.)

In her opening brief, Fregoso not only fails to discuss evidence that supports the jury's verdict, but she also mischaracterizes the opinion of one expert—Marc Pryor—whose testimony the jury relied on to find Fregoso negligent. For example, Fregoso claims that "Pryor did not dispute Avrit's [testimony] that Fregoso could not have avoided the accident, nor did he address or disagree with Dr. Krauss's opinion that a driver in Fregoso's circumstances would have been unable to see a dark-clad pedestrian like Deleon in low-light conditions until 100 feet from the crosswalk." As our summary of his testimony shows, Pryor contradicted the parts of Avrit's and Krauss's testimony where they opined that Fregoso would not have been able to avoid hitting Deleon. Specifically, Pryor testified that Fregoso was distracted from the road in front of her as she approached the crosswalk where the accident occurred because she was attempting to pass a truck that was driving in the lane to her right.

In any event, we conclude substantial evidence supports the jury's finding that Fregoso was negligent for causing the accident. The jury heard evidence that Fregoso's failure to pay attention to what was occurring in front of her as she approached the intersection of Norwalk Boulevard and Firestone Boulevard caused her to hit Deleon. Fregoso testified that she moved to the left-hand lane about 100 feet before she reached the intersection because she wanted to pass a truck before making a right turn a couple of blocks after Norwalk Boulevard. In Pryor's opinion, Fregoso's preoccupation with passing the truck distracted her

from what was occurring in front of her, including Deleon entering the portion of the crosswalk that traversed Fregoso's lane. According to Pryor, had Fregoso been paying attention, she could have seen Deleon as he entered the part of the crosswalk that traverses the westbound lanes of Firestone Boulevard, at which point Fregoso would have been about 260 feet from the crosswalk. If Fregoso had seen Deleon at that point, she would have been able to stop her car between 35 to 65 feet before reaching the front of the crosswalk. Based on this evidence, it was more than reasonable for the jury to conclude that Fregoso was negligent when she hit Deleon. (See *Downing*, *supra*, 38 Cal.App.3d at p. 524 [it is the driver's responsibility to be on the lookout for, and to drive at a pace that allows the driver to avoid hitting, pedestrians].)

We also conclude substantial evidence supports the jury's finding that Fregoso was 95 percent at fault for causing the accident. Deleon entered the portion of the crosswalk that traverses the westbound lanes of Firestone Boulevard when Fregoso was about 260 feet from the intersection. At that point, both Fregoso and the truck in front of her would have been in the right-hand lane, since Fregoso didn't switch to the left-hand lane until she was 100 feet from the intersection. Since the only oncoming traffic Deleon would have seen was around 260 feet away and in the farthest lane from him, he reasonably could have believed that the approaching traffic would have yielded to allow him to cross the intersection. Regardless, the jury reasonably could have found Fregoso, and not Deleon, was primarily responsible for causing the accident based on the following facts: (1) the crosswalk Deleon was using was marked and illuminated by streetlights; (2) Fregoso was aware the road on which she was

driving contained pedestrian crosswalks; and (3) Fregoso could have seen Deleon from a distance at which she would have had sufficient time to avoid hitting him. The fact that it was dark out, that Deleon was wearing dark-colored clothing, or that Fregoso claimed she had never seen a pedestrian use the crosswalk at the Norwalk Boulevard and Firestone Boulevard intersection, did not relieve Fregoso of her duty under Vehicle Code section 21950 to be on the lookout for pedestrians using the crosswalk.[4] (See *Moritz v. City of Santa Clara* (1970) 8 Cal.App.3d 573, 576 ["The driver of [a] vehicle is not permitted to lessen compliance with [her] duties [under Veh. Code, § 21950] because of the hour of the day or night …"].)

2. Fregoso has not shown the court prejudicially erred in admitting expert testimony addressing a driver's perception-response time.

Fregoso next contends the court prejudicially erred when it allowed Rock Miller, a traffic engineer, to testify about a driver's

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[4] In her reply brief, Fregoso contends that she is entitled to judgment because Deleon admitted in his complaint that Fregoso could not have avoided the accident. Fregoso cites paragraph 21 in Deleon's complaint, which states: "Because of the overgrown [p]lants[,] Ms. Fregoso was unable to see Mr. Deleon, Jr. until it was too late to stop her car before she struck him." Fregoso contends this allegation constitutes a judicial admission that should have removed the issue of whether she was negligent from Deleon's lawsuit. We need not address this argument because Fregoso raises it for the first time in her reply brief, and she fails to explain why she could not have raised it in her opening brief. (*Campos v. Anderson* (1997) 57 Cal.App.4th 784, 794, fn. 3 ["Points raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before."].)

perception-response time. Fregoso argues that because Miller was not an expert on "human factors," the court should not have allowed him to opine about an average driver's perception-response time. Fregoso claims the court's failure to exclude Miller's testimony was prejudicial because Fregoso's ability to perceive and react to Deleon entering the crosswalk was a central issue at trial.

Under Evidence Code section 801, an expert may offer an opinion "based on any matter made known to the witness 'at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion ... .' " (*Maatuk v. Guttman* (2009) 173 Cal.App.4th 1191, 1197, citing Evid. Code, § 801, subd. (b).) " 'The court may, and upon objection shall, exclude testimony in the form of an opinion that is based in whole or in significant part on matter that is not a proper basis for such an opinion.' (Evid. Code, § 803.) A trial court enjoys broad discretion in ruling on foundational matters on which expert testimony is to be based." (*Maatuk*, at p. 1197.) Accordingly, we review a court's decision to admit or exclude expert testimony for abuse of discretion. (*Ibid.*)

Miller testified for the City. When testifying about the design standards for the portion of Firestone Boulevard that approaches the intersection with Norwalk Boulevard, the City's counsel asked Miller about the perception-response times the City used in designing the road. Miller confirmed the City used a perception-response time of two and a half seconds, which he believed was "very conservative" to compensate for a "very, very wide range of drivers." In Miller's opinion, the average perception-response time for drivers is closer to seven-tenths of a

second. Fregoso objected to Miller's statement on hearsay and lack of foundation grounds, which the court overruled.

On cross-examination, Miller acknowledged that he was not a "human factors expert." Miller was not trained on the subject of human factors, but he had read "some incidental literature on it." After Miller testified, Fregoso moved to strike his testimony "as it relates to any human factors, including perception-reaction time." The court denied Fregoso's motion.

We need not decide whether the court abused its discretion by failing to strike Miller's testimony addressing the average perception-response time of drivers because any error in admitting that testimony was harmless. Where evidence is improperly admitted, the error is not reversible unless " 'it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.' [Citation.]" (*Grail Semiconductor, Inc. v. Mitsubishi Electric & Electronics USA, Inc.* (2014) 225 Cal.App.4th 786, 799.)

Here, Fregoso has failed to show why it is reasonably probable she would have obtained a more favorable verdict had Miller's testimony been excluded. For example, Fregoso claims only that Miller's testimony would have been "highly confusing to the jury" because it was at odds with the other experts' testimony. But Fregoso does not claim that the jury relied on Miller's testimony to improperly conclude she was negligent in failing to avoid the accident. In fact, Fregoso does not point to any part of the record in which Miller or any other expert opined that Fregoso's perception-response time was seven-tenths of a second immediately before the accident, nor does she cite to any part of the record where one of the experts applied a perception-response time of seven-tenths of a second in determining that Fregoso

could have avoided the accident. Moreover, because Fregoso has not provided us with transcripts of the parties' closing arguments, we are unable to determine to what extent, if any, the parties relied on Miller's testimony in arguing the issue of Fregoso's negligence. (See *Continental Airlines, Inc. v. McDonnell Douglas Corp.* (1989) 216 Cal.App.3d 388, 423–424 [the extent to which counsel relies on inadmissible evidence during closing argument is a relevant factor in determining whether appellant suffered prejudice from the admission of that evidence].)

In any event, the record affirmatively shows Fregoso was not prejudiced by Miller's testimony about the average perception-response time of drivers. At trial, the jury heard two competing theories about the cause of the accident. Fregoso and Deleon adopted similar theories, introducing experts who opined that Fregoso's failure to avoid hitting Deleon was primarily caused by poor lighting conditions and the foliage inside the median dividing the east- and westbound lanes of Firestone Boulevard. Both experts testified that once Fregoso would have been able to see Deleon, she would not have had sufficient time to avoid the accident. The City's defense, on the other hand, was based on a theory that Fregoso was distracted as she approached the intersection because she was attempting to pass a truck, and that Fregoso's failure to pay adequate attention to the road, and not any visual obstruction caused by the median, led to the accident.

It is clear from the parts of the record Fregoso provided on appeal that the jury adopted the City's theory of liability, while rejecting Fregoso's and Deleon's theories. Specifically, the jury

found the City shared no responsibility for causing the accident.[5] Thus, the jury believed Pryor's testimony that Fregoso should have been able to avoid the accident had she not been distracted as she approached the intersection of Norwalk Boulevard and Firestone Boulevard. Since Pryor testified that Fregoso could have stopped her car in time to avoid the accident if her perception-response time was between two and two and a half seconds, which is considerably longer than what Miller claimed was the average perception-response time for drivers, any error in admitting Miller's testimony was harmless.

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[5] Fregoso has omitted from the record several pages of the jury's special verdict form. Although the pages of the form that are included in the record show the jury found the City was not liable for causing the accident, the record does not include several pages that show the specific findings the jury made with respect to whether the City's maintenance of the median dividing Firestone Boulevard constituted a dangerous condition of public property. Since it was Fregoso's burden to provide a complete record on appeal, we presume the missing pages from the special verdict form show that the jury found the median dividing the east- and westbound lanes did not constitute a dangerous condition of public property. (*Construction Financial v. Perlite Plastering Co.* (1997) 53 Cal.App.4th 170, 179 [if an appellant fails to provide any parts of the record that could support the court's judgment, it will be presumed that those parts of the record support the judgment].)

DISPOSITION

The judgment is affirmed. Deleon shall recover his costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LAVIN, J.

WE CONCUR:

EDMON, P. J.

DHANIDINA, J.